In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 79-27

CARL E. FRIEND,
Petitioner

Versus

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

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CARL E. FRIEND,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

The petitioner, Carl E. Friend, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case.

OPINIONS BELOW

The unpublished order of affirmance of the United States Court of Appeals for the Sixth Circuit, entered on March 27, 1979, appears in Appendix C to this petition at pages A-6 through A-8. The affirmance of this case was referred to as a decision without published opinion at 594 F.2d 864 (1979).

The unpublished order of the United States Court of Appeals for the Sixth Circuit denying rehearing, entered on June 7, 1979, appears in the Appendix D to this petition at pages A-9 through A-10.

The judgment and commitment order of the United States District Court for the Western District of Tennessee was not

published, but appears in Appendix A hereto at pages A-1 through A-3.

JURISDICTION

1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1970) which provides in part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree....

2. The judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 27, 1979. A timely motion for rehearing was denied on June 7, 1979.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Sixth Circuit has denied the Petitioner the right to appeal, and moreover, the right to *effective* appeal, as required by this Court's holdings in *Rodriquez v. United States,* 395 U.S. 327, 329-330 (1969); and *Coppedge v. United States,* 369 U.S. 438, 441 (1962); by the court of appeals' repeated refusal to address the issue raised by the petitioner as decisive herein; that Petitioner was denied the right to intelligent exercise of peremptory challenge guaranteed by this Court's holding in *Swain v. Alabama,* 380 U.S. 202, 218-221 (1965); by the latent insertion of the jury selection card of one Edna Dollar into the jury wheel after Petitioner had exhausted all peremptory challenges.

2. Whether the judgment of the United States Court of Appeals for the Sixth Circuit that Petitioner was not subjected to an error affecting the substantial rights of the parties pursuant to Fed. R. Crim. P. 52 and denying the petitioner the right to intelligent exercise of peremptory challenge is in direct contravention to this Court's mandate in *Swain v. Alabama,* 380 U.S. 202, 218-221 (1965).

STATUTES INVOLVED

1. The statues under which Petitioner was convicted, though nothing presented herein for review by this Court turns on their terms, were 18 U.S.C. § 1341 (1970) and 18 U.S.C. § 1343 (1970). Such statutes provide as follows:

> §1341. Frauds and swindles
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or gradulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at

which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

2. The statutes which, together with the case law gloss supplied by *Rodriquez v. United States*, 395 U.S. 327, 329-330 (1969); and *Coppedge v. United States*, 369 U.S. 438, 441 (1962); and Fed. R. Crim. P. 37(a), Petitioner asserts grant a meaningful appeal as a matter of right to one convicted in a district court of a criminal offense are as follows:

§ 1291. Final decisions of district court

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review

may be had in the Supreme Court.

§ 1294. Circuits in which decisions reviewable

Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district;

(2) From the United States District Court for the District of the Canal Zone, to the Court of Appeals for the Fifth Circuit;

(3) From the District Court of the Virgin Islands, to the Court of Appeals for the Third Circuit;

(4) From the District Court of Guam, to the Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

In October of 1976 an indictment was returned charging the petitioner, Carl E. Friend, with three counts of mail fraud (18 U.S.C. § 1341 (1970)), and two counts of wire fraud (18 U.S.C. § 1343 (1970)).

The trial in the case at bar commenced on February 27, 1978. The case was tried in the United States District Court for the Western District of Tennessee, Western Division, before the Honorable Robert M. McRae, Jr., and a jury.

Petitioner was convicted of all charges contained in the indictment and was sentenced to imprisonment for one year and one day on each of the five counts contained therein. These sentences were to run concurrently. The judgment and commitment order was entered on May 19, 1978. (A-1 -- A-3).

Timely notice of appeal was filed on the 26th day of May, 1978, and timely appeal was made to the United States Court of Appeals for the Sixth Circuit. The court of appeals affirmed the judgment and commitment order of the district court by order entered without opinion on March 27, 1979. Petitioner timely petitioned the court of appeals for rehearing. Such petition was denied by order entered without opinion on June 7, 1979. These orders of the court of appeals appear in Appendix B and Appendix C, respectively to this petition.

Petitioner asserts that the jury selection process utilized in the case at bar contained defects which denied Petitioner the right to intelligent exercise of peremptory challenge.

The procedure used by the Honorable Robert M. McRae, Jr., the judge who presided over the trial of the case at bar, for selecting jurors in criminal cases is as follows: Potential jurors from the master juror list are brought into the courtroom. Cards representing each and every juror are placed in the juror selection wheel. The cards are drawn from the wheel and Judge McRae conducts a general voir dire of such potential jurors. After the cards are drawn, the jurors are called and counsel for the government and for the defendant are respectively allowed to present specific questions to the judge to be asked of each potential juror and, thereafter, to exercise challenges for cause as well as peremptory challenges. If any challenge, for cause is denied and if no peremptory challenge is made, or if the challenging party has exhausted all peremptory challenges, the juror is seated in the jury box.

In the case at bar, the panel of potential jurors was brought into the courtroom. This panel included one Edna Dollar. Although the potential juror list included information as to address, occupation and so forth of the majority of potential jurors, the list contained no information as to Edna Dollar other than her name. (A-12). The cards of all the jurors *other than Edna Dollar* were placed in the wheel at the commencement of the selection process; before the first card was withdrawn.

The first twelve of these cards which had been in the wheel from the inception of the jury selection process were withdrawn. Judge McRae asked this initial panel questions of a very general nature. As the questioning process continued more specific and probing questions were asked. After the first panel of twelve was questioned, successive panels of potential jurors were withdrawn to replace previously drawn jurors who had been dismissed after challenge. After each successive group of jurors was drawn, that group was subjected to questioning of both a general and specific nature. *No potential juror was subjected to any questioning prior to the drawing of that respective potential juror's card from the selection wheel.* The only information concerning each potential juror which was available to the parties prior to the time at which that respective juror's card was drawn from the wheel set out that prospective juror's name, address and employer. Even this most rudamentry information was not available for the potential juror named Edna Dollar. The juror list contained Mrs. Dollar's name only.

Twenty-nine cards were drawn from the selection wheel. *All* of these cards had been in the wheel from the inception of the jury selection process. *All* of these cards were placed in the wheel prior to the time at which the first card was withdrawn; prior to the time at which Judge McRae asked the first question of the first juror. Only after eighteen of these potential jurors had been dismissed pursuant to challenges of the parties; only after the petitioner had exercised all of Petitioner's peremptory challenges; and only after eleven members of the jury panel had been seated was juror Edna Dollar's card placed in the jury selection wheel. Immediately after juror Dollar's card was placed in the near empty wheel, it was withdrawn. Prior to such time of withdrawal, Petitioner had no information concerning juror Dollar other than her name.

Petitioner entered a challenge for cause against juror Dollar because of the latent insertion of her card in the wheel. All of Petitioner's peremptory challenges had been exhausted prior to the placing of juror Dollar's card in the wheel. The challenge for cause was denied, and juror Dollar was seated as the twelfth juror in the panel.

At the close of trial, Petitioner was convicted on all the charges for which Petitioner was indicted. Petitioner appealed to the United States Court of Appeals for the Sixth Circuit, arguing among other things, that the latent insertion of juror Dollar's card into the selection wheel denied Petitioner the right to intelligent exercise of peremptory challenge. The court of appeals affirmed the district court, however, and a petition for rehearing was filed. The petition for rehearing again stressed specifically the contention that Petitioner had been denied the right to intelligent exercise of peremptory challenge by this abnormality in the method by which the jury in the case at bar was selected. This

petition for rehearing was denied. Nowhere in either the order of affirmance or the order denying rehearing entered herein (the only pronouncements ever made by the court of appeals concerning the case at bar), did the court of appeals discuss the petitioner's argument that the latent insertion of juror Dollar's card in the wheel denied Petitioner the right to intelligent exercise of peremptory challenge. Such concept was not even mentioned.

After the petition for rehearing was denied on June 7, 1979, the Petitioner moved the court of appeals to stay issuance of the mandate herein pending application to the Supreme Court for writ of certiorari. Petitioner hereby respectfully makes such application to this Court.

REASONS FOR GRANTING THE WRIT

I

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS DENIED THE PETITIONER THE RIGHT TO APPEAL, AND MOREOVER, THE RIGHT TO *EFFECTIVE* APPEAL, AS REQUIRED BY THIS COURT'S HOLDINGS IN *RODRIQUEZ V. UNITED STATES*, 395 U.S. 327, 329-330 (1969); AND *COPPEDGE V. UNITED STATES*, 369 U.S. 438, 441 (1962); BY THE COURT OF APPEALS' REPEATED REFUSAL TO ADDRESS THE ISSUE RAISED BY THE PETITIONER AS DECISIVE HEREIN; THAT PETITIONER WAS DENIED THE RIGHT TO INTELLIGENT EXERCISE OF PEREMPTORY CHALLENGE GUARANTEED BY THIS COURT'S HOLDING IN *SWAIN V. ALABAMA*, 380 U.S. 202, 218-221 (1965); BY THE LATENT INSERTION OF THE JURY SELECTION CARD OF ONE EDNA DOLLAR INTO THE JURY WHEEL AFTER PETITIONER HAD EXHAUSTED ALL PEREMPTORY CHALLENGES.

Petitioner has manifestly contended throughout all proceedings in the case at bar that Petitioner was severely impaired in Petitioner's intelligent use of peremptory challenge. The denial of this most fundamental right was caused by the defective and delayed manner in which the juror selection card of Mrs. Edna Dollar was placed in the jury wheel. The United States Court of Appeals for the Sixth Circut, whoever, has repeatedly refused to address this most basic and decisive issue.

Petitioner's brief on appeal states:

> It is respectfully contended that the late selection of the juror substantially interfered with the defendant's intelligent exercise of peremptory challenges.
>
> . . . .
>
> What is contended is that the court failed to correct an error in the selection process that seriously limited the defense in an intelligent exercise of peremptory challenges. (Appellant's Brief-8).

The order of affirmance issued by the court of appeals on March 27, 1979, (A-6 -- A-8), however, contains no reference whatsoever to this decisive issue raised by the petitioner. The single paragraph in the order of affirmance purporting to correspond to the section of Petitioner's brief raising this decisive issue is concerned only with two erroneous conceptions:

1. That the petitioner asserted lack of knowledge as to the identity of Edna Dollar as a potential juror. (A-7); and

2. That the petitioner claimed that Petitioner "was denied an impartial jury selected at random from a fair cross section of the community." (A-7).

Petitioner's only reference to "random selection" throughout the proceedings in the case at bar has been concerned with the impossibility of selection (by chance drawing) of a juror's card which is not in the jury wheel. This reference has been made only in conjunction with the logical premise that, pursuant to the sequence of steps used in jury selection by the district judge herein, a juror cannot be subjected to peremptory challenge until that juror's card is drawn from the wheel. That juror's card cannot be drawn from the wheel if it has not been placed in the wheel. Therefore, the absence of the card from the wheel until after all peremptory challenges are exhausted precludes even the remotest possibility that that juror will *ever* be subjected to peremptory challenge.

Petitioner does not assert that Petitioner lacked knowledge as to the identity of Edna Dollar as a prospective juror. However, considering the sequence of steps used by the district judge in jury selection, specifically the facts that questioning of the individual juror is not conducted and peremptory challenges may not be exercised until *after* the juror's card is withdrawn from the wheel, such knowledge, per se, would be of no significant aid in the intelligent exercise of peremptory challenge. This is especially true in cases, such as that at bar, where the prospective juror's card was not placed in the wheel and made subject to withdrawal until after all peremptory challenges were exhausted.

Petitioner asserts that, from the order of affirmance, one can only conclude that the decisive issue of denial of intelligent exercise of peremptory challenge which was raised by the petitioner was not considered by the court of appeals.

On rehearing, Petitioner re-asserted the vital issue of intelligent exercise of peremptory challenge. Furthermore, Petitioner strived to clarify and exemplify the issue which Petitioner had asserted on appeal by opening the petition to rehear with the following paragraph:

> The Appellant, Carl E. Friend, respectfully petitions this Court for rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure for the reason that, in the opinion of the petitioner, the Court based its holding concerning the issue of Petitioner's right to peremptory challenge on the erroneous conception that the petitioner asserted lack of knowledge as to the identity of Edna Dollar as a potential juror. Petitioner does not now, and never has, contended that Petitioner did not know of Edna Dollar's identity as a potential juror. Petitioner asserts that, because juror Dollar's card was not placed in the jury selection wheel prior to Petitioner's exhaustion of peremptory challenges, he was not only limited, but barred, in his guaranteed use of peremptory challenges. (Petition for Rehearing-1, 2).

Petitioner went on to explain in detail the procedure used by the district judge for jury selection. (Petition for Rehearing-2). The argument of Petitioner that Petitioner was denied intelligent use of peremptory challenge was reiterated in the petition for rehearing, relating in detail the pertinent facts in the case at bar to such argument.

The court of appeals emphatically stated in its order denying the petition to rehear that "This juror's [Edna Dollar's] card should have been placed in the jury wheel at the beginning of the voir dire, as defendant argues . . . ." (A-10). Even in the face of this finding, however, the court of appeals again refused to address the issue of denial of intelligent exercise of peremptory challenge. Again, the court of appeals discussed "random selection" and knowledge of the identity of Edna Dollar as a potential juror. (A-10). As with the order of affirmance, one can only conclude from the order denying the petition to rehear that the decisive issue of denial of intelligent exercise of peremptory challenge was again not considered by the court of appeals--even after that issue was specifically reiterated in the petition to rehear.

Petitioner respectfully asserts that, although this decisive issue of fundamental rights has repeatedly been argued to the court of appeals, such court has *never* indicated in any of its orders that such issue has been resolved. Furthermore, Petitioner respectfully asserts that this decisive issue has never even been considered by the court of appeals.

The right to intelligent exercise of peremptory challenge has long been held to be "one of the most important rights secured to the accused." *Pointer v. United States*, 151 U.S. 396, 408 (1894). The right is so fundamental that this Court has repeatedly held "The denial or impairment of . . .[it] is reversible error without a showing of prejudice." *Swain v. Alabama*, 380 U.S. 202, 219 (1965). *See Also: Lewis v. United States*, 146 U.S. 370 (1892); *Harrison v. United States*, 163 U.S. 140 (1896).

Petitioner asserts that he was denied this most fundamental right. This denial constitutes reversible error in and of itself. Moreover, Petitioner asserts that, although Petitioner repeatedly raised the issue of right to intelligent exercise of peremptory challenge to the court of appeals, such court re-

fused to even consider such issue. This lack of consideration of the issue of the denial of such a vital right vitiates the effectiveness of Petitioner's appeal. An "appeal" which fails to appreciate, much less address, the most central and prevailing issue asserted by the appellant is in reality no appeal at all. Appeal from a criminal conviction in a district court is, in effect, a matter of right. *Rodriquez v. United States*, 395 U.S. 327, 329-330 (1969); *Coppedge v. United States*, 369 U.S. 438, 441 (1962); 28 U.S.C. §§ 1291, 1294 (1970); Fed. R. Crim. P. 37(a). An appeal, such as that at bar, which lacks basic substance, does not satisfy this right.

In order to assure the basic right of effective appeal as set out in *Rodriquez* and *Coppedge*, and more specifically, in order to assure the right to intelligent exercise of peremptory challenge requested by the Petitioner and ignored by the courts below, Petitioner respectfully petitions the court to issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

II

THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT THAT PETITIONER WAS NOT SUBJECTED TO AN ERROR AFFECTING THE SUBSTANTIAL RIGHTS OF THE PARTIES PURSUANT TO FED. R. CRIM. P. 52 AND DENYING THE PETITIONER THE RIGHT TO INTELLIGENT EXERCISE OF PEREMPTORY CHALLENGE IS IN DIRECT CONTRAVENTION TO THIS COURT'S MANDATE IN *SWAIN V. ALABAMA*, 380 U.S. 202, 218-221 (1965).

Assuming arguendo that the court of appeals considered the issue of denial of intelligent exercise of peremptory

challenge, its affirmance of the district court's judgment of conviction is in direct contravention to this court's holding in *Swain v. Alabama*, 380 U.S. 202 (1965). That case forcefully states the extreme importance of this fundamental right in the American criminal justice system.

> "In contrast to the course in England, where both peremptory challenge and challenge for cause have fallen into disuse, peremptories were and are freely used and relied upon in this country, perhaps because juries here are drawn from a greater cross-section of a heterogeneous society. The voir dire in American trials tend to be extensive and probing, operating as predicate for the exercise of peremptories, and the process of selecting a jury protracted. The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury . . . . *Although "[t]here is nothing in the Constitution of the United States which requires the Congress [or the States] grant peremptory challenges," . . . nonetheless the challenge is "one of the most important of the rights secured to the accused," . . . The denial or impairment of the right is reversible error without a showing of prejudice.* . . . "For it is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose."

The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evi-

dence placed before them, and not otherwise. In this way the peremptory satisfies the rule that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" . . . Indeed the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the voir dire and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause. Although historically the incidence of the prosecutor's challenge has differed from that of the accused, the view in this country has been that the system should guarantee "not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held."

The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control . . . . *while challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable.* . . . It is often exercised upon the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, " . . . upon a juror's "habits and associations" . . . "or upon the feeling that 'the bare question [a juror's] indifference may sometimes provoke a resentment'." . . . It is no less frequently exercised on grounds normally

> thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. [Citations omitted; Emphasis added]. 380 U.S. at 218-220.

The facts and argument before the court of appeals evidenced a severe and detrimental deviation in the jury selection process used in the trial of the case at bar. The card of the juror, Edna Dollar, was not placed into the jury selection wheel until after the petitioner had exhausted all peremptory challenges; not until after all the other jurors had been chosen and seated in the jury box. Only one juror remained to be selected. Then, and only then, was Edna Dollar's card placed in the near empty wheel.

In its order denying the petition to rehear, the court of appeals admittedly found that the latent insertion of Edna Dollar's card was error: "This juror's card should have been placed in the jury wheel at the beginning of the voir dire. . .'" (A-10).

Petitioner asserts that, because juror Dollar's card was not placed in the jury selection wheel prior to Petitioner's exhaustion of peremptory challenges, Petitioner was not only limited, but barred, in Petitioner's use of peremptory challenges guaranteed by *Swain*.

The procedure used by the Honorable Robert M. McRae, Jr., the judge who presided over the trial of the case at bar, for selecting jurors in criminal cases is as follows: Potential jurors from the master juror list are brought into the courtroom. Cards representing each and every juror are placed in the juror selection wheel. The cards are drawn from the

wheel and Judge McRae conducts the voir dire of all potential jurors. After the cards are drawn, the jurors are called and counsel for the government and for the defendant are respectively allowed to present specific questions to the judge to be asked of each potential juror and, thereafter, to exercise challenges for cause as well as peremptory challenges. If any challenge for cause is denied and if no peremptory challenge is made, or if the challenging party has exhausted such challenges, the juror is seated in the jury box.

In the case at bar, the panel of potential jurors was brought into the courtroom. This panel included Edna Dollar. Although the potential juror list included information as to address, occupation and so forth of the majority of potential jurors, the list contained no information as to Edna Dollar other than her name. (A-12). The cards of the other jurors were placed in the wheel at the commencement of the selection process. Edna Dollar's card, however, was not placed in the wheel until immediately prior to the withdrawal of same. (A-15). As to all jurors other than Edna Dollar, the mandated process of random selection prevailed. Each such respective juror's card was drawn, by chance, from the wheel. Then such juror, chosen by this method of selection, was subjected to challenge for cause and to peremptory challenge. During the process of the voir dire of these randomly selected jurors (of which Edna Dollar was not included because her card had not been placed in the wheel), the petitioner exhausted all peremptory challenges.

After all peremptory challenges were exhausted and after all the other jurors had been chosen and seated in the jury box, then, and only then, was Edna Dollar's card placed in the near empty wheel. Petitioner submits that, statistically, the chance of Edna Dollar being selected from such a near

empty wheel was almost assured. It cannot be said that Edna Dollar was randomly selected as a juror from the jury venire pursuant to the method used by the district judge for jury selection.

If Edna Dollar's card had been placed in the wheel at the commencement of the jury selection process, it is very possible, if not probable, that by the chance of the wheel, she would have been chosen as a prospective juror and subjected to questioning and peremptory challenge prior to the time when Petitioner exhausted such challenges. Indeed, if Edna Dollar's card had not been selected, at least fundamental requirements of fairness would have been satisfied. Pursuant to the selection system utilized by the district judge, she could not be subjected to peremptory challenge prior to her selection from the wheel. Without her card being placed in the wheel, there was absolutely no way in which she could be chosen as a potential juror. One can only select from the choices available. Edna Dollar's card was not in the wheel. The choice of Ms. Dollar as a prospective juror was not available. *Petitioner submits that fairness dictates that all prospective jurors at least be susceptible to selection from the jury venire from the beginning of the selection process which potentially subjects them to the exercise of a peremptory challenge.*

In the case at bar, the absence of Edna Dollar's card from the wheel prevented any possibility of her being selected prior to the petitioner's exhaustion of peremptory challenges. Petitioner submits that this deviation from fair and random jury selection was far more than a mere technical irregularity. *Petitioner asserts that the deviation denied Petitioner the potentiality of having Edna Dollar's card drawn prior to Petitioner's exhaustion of peremptory challenges, thereby*

severely impairing the petitioner's intelligent exercise of peremptory challenges. This impairment of the right of peremptory challenge is in direct contravention to this Court's holding in *Swain*.

This Court has repeatedly stressed the function of the peremptory challenge as the most vital tool to combat real or imagined prejudice which is not sufficiently demonstrable to result in the sustaining of a challenge for cause. *Swain*, 380 U. S. at 220; *Hayes v. Missouri*, 120 U.S. 68, 70 (1887); *Lewis v. United States*, 146 U.S. 370, 376 (1892).

Juror Dollar, upon questioning by the district judge after her latently inserted card was drawn from the wheel, stated that her husband had "grown up" with Kemmons Wilson, one of the prosecution's chief witnesses and an alleged victim of the fraud for which Petitioner was convicted. (A-13). The juror also stated that her son-in-law had been employed with Holiday Inn, a company which Kemmons Wilson founded and presided over. (A- 13). Although the juror stated that these acquaintances with Mr. Wilson and his company would not be received with any prejudice or bias, (A- 14), Petitioner submits that this situation is a classic example of "prejudice which is not easily demonstrable". Petitioner asserts that the use of peremptory challenge to strike juror Dollar would have been directly in line with the use of such challenges so repeatedly stressed by this Court in *Swain, Hayes* and *Lewis. Petitioner, however, never had an opportunity to exercise a peremptory challenge against this juror.*

Pursuant to the jury selection process used by the district judge, Petitioner did not have the opportunity to question this prospective juror and elicit the prejudice indicating testimony until Edna Dollar's card was drawn from the wheel.

Before juror Dollar's card was placed in the wheel and withdrawn, Petitioner was given no opportunity to obtain the information necessary to determine the existence of this "prejudice not easily demonstrable" which the peremptory challenge is so well suited to eliminate.

"A defendant is entitled to have sufficient information brought out on venire to enable him to exercise his challenges in a reasonably intelligent manner, lest the statutory right become an empty ritual." *United States v. Rucker,* 557 F.2d 1046, 1048 (4th Cir. 1977). Petitioner could not obtain the information necessary to intelligently exercise Petitioner's peremptory challenges. That information was denied Petitioner by the absence of juror Dollar's card from the wheel until after Petitioner exercised all peremptory challenges. Without being in the wheel, the card could not be drawn; and without being drawn, the necessary information concerning juror Dollar could not be obtained. In the words of the United States Court of Appeals for the Fourth Circuit, the right to intelligent exercise of peremptory challenge in the case at bar was reduced to "an empty ritual" by the latent insertion of juror Dollar's card in the jury wheel. *Rucker,* 557 F.2d at 1048. "Empty ritual" must be abrogated from the American criminal justice system. Petitioner respectfully requests this Court to convert "empty ritual" into just reality by granting the writ of certiorari requested herein.

Any restriction or limitation, whatsoever, on the intelligent exercise of peremptory challenge "is reversible error without a showing of prejudice". *Swain,* 380 U.S. at 219. The court of appeals found that juror Dollar's card should have been placed in the jury wheel at the commencement of the voir dire. (A- 15). The court of appeals admitted that

this error had been commited in the trial of Petitioner's case. Petitioner asserts that this error denied Petitioner intelligent exercise of peremptory challenge. However, in the face of the court of appeal's finding that this error had been commited, that court found the faulty jury selection process in the case at bar did not affect the substantial rights of the parties under Fed. R. Crim. P. 52. (A- 15). This finding is in direct contravention of this Court's mandate in *Swain* that any such error requires reversal without a showing of prejudice. Petitioner would cite this Court to its holding in *Lewis* that the guaranteed right to intelligent exercise of peremptory challenge "must be exercised with full freedom, or it fails of its full purpose." 146 U.S. at 378. *Accord, Swain,* 380 U.S. at 219. Full freedom was denied the petitioner in the exercise of this guaranteed right. This denial was affirmed by the United States Court of Appeals for the Sixth Circuit in contravention of this Court's holdings in *Swain* and *Lewis.* Full purpose of such guaranteed right can now only be assured by correction of this error through invocation of certiorari jurisdiction, reversal of the courts below and the granting of a new trial herein.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

J. N. RAINES,
Suite 1700
One Commerce Square
Memphis, TN 38103
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of July, 1979, three copies of this petition were mailed, postage prepaid, to the Solicitor General of the United States, Department of Justice, Tenth and Pennsylvania Avenue, N.W., Washington, D.C. 20530. I further certify that all parties required to be served have been served.

J. N. RAINES

APPENDIX A

JUDGMENT AND COMMITMENT

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA

vs.

CARL FRIEND

DOCKET NO. CR-76-133

JUDGMENT AND COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date - May 19, 1978.

WITH COUNSEL: Jim Raines and Michael Robinson, retained.

PLEA: NOT GUILTY.

FINDING & JUDGMENT: There being verdict of GUILTY.

Defendant has been convicted as charged of the offense(s) of Mail Fraud, in violation of 18:1341 as more fully set out in Counts 1, 4 and 5 of the indictment; and Fraud by Wire in violation of 18: 1343 as more fully set out in Counts 2 and 3 of the indictment.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE YEAR AND ONE DAY on each of the five counts, to run concurrently.

The defendant has been granted leave by the Court to report to the institution designated by the Attorney General at his own expense. Upon designation of an institution by the Attorney General to the U.S. Marshal, the Clerk of Court will issue an Order to Surrender to defendant, stating the time and place when and where defendant is to report. Upon receipt of the Order to Surrender by the defendant, the defendant will report to the Office of the Clerk to acknowledge receipt of the order and to the office of the Marshal.

ADDITIONAL CONDITIONS OF PROBATION

In addition in the special conditions, of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court

may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends, the Federal Correctional Institution at Memphis as the institution for sentence to be served.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

s/ Robert M. McRae, Jr.
U.S. District Judge

APPROVED: s/ William A. Mc(Illegible) AUSA
Date: 5-22-78

Certified as a True Copy on this Date 5-22-78

By: s/ M. Cleaues
Deputy

APPENDIX B

NOTICE OF APPEAL

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA, CR. NO. 76-133

VS [18 U.S.C. § 1341
18 U.S.C. § 1343]

CARL E. FRIEND.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Carl E. Friend, the defendant named above, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the Final Judgment and Commitment Order entered in this action on the 19th day of May, 1978.

s/ J. N. Raines

s/ Michael A. Robinson
ATTORNEYS FOR
CARL E. FRIEND

CERTIFICATE OF SERVICE

I, J. N. Raines, hereby certify that I have this 26th day of May, 1978, served a copy of the foregoing on the U.S. Attorney by placing a copy in the United States Mail, postage prepaid, addressed to him at 1058 Federal Building, 167 North

Main Street, Memphis, Tennessee 38103.

s/ J. N. Raines
J. N. RAINES

APPENDIX C

ORDER AFFIRMING JUDGMENT OF CONVICTION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 78 - 5317
FILED: March 27, 1979

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v. ORDER

CARL E. FRIEND,
Defendant-Appellant

Before: WEICK, ENGEL and MERRITT, Circuit Judges.

The defendant appeals a judgment entered on a jury verdict of guilty to three counts of mail fraud, 18 U.S.C. §1341, and two counts of wire fraud, 18 U.S.C. § 1343, arising from a scheme to sell shares or rights to participate in the profits of a phonograph album entitled "History of the States." The District Court imposed concurrent sentences of one year and one day on each count.

The evidence in the record permitted the jury to find that the defendant misrepresented to potential investors that he was the owner of property rights in a fifteen record phonograph album entitled "History of the States" which he proposed to release as a part of the nation's Bicentennial celebration as well as a number of other facts concerning the

investment. Based on such misrepresentations the defendant obtained money from investors using the mail and wire facilities as a means to carry out the scheme. The defendant raises three issues on appeal.

1. The defendant complains that one of the witnesses, Mr. Whitt, was permitted to testify concerning personal loans to the defendant and that the prosecutor erroneously characterized Mr. Whitt's testimony. While this witnesses' testimony and the prosecutor's statements regarding the witness are somewhat confusing, the witness's personal loans to the defendant are intimately tied in to his investment in the defendant's scheme, and we do not find that this confusion was prejudicial, nor do we find that there is any material variance between Counts II and III and the proof concerning the dates of the wires relied upon as a means of carrying out the fraudulent scheme.

2. The record does not demonstrate that juror Dollar's identity as a potential juror was unknown to the defendant because her name was not in the jury records and that defendant was prevented from exercising a peremptory challenge with respect to this witness because, by the time he found out that she was a potential witness, he had already exhausted his peremptory challenges. The record does not support the proposition that defendant's identity was not properly recorded in the jury records. This view of the juror's identification in the records is based on a statement by the court which the court subsequently corrected. The defendant does not attack the court's refusal to dismiss the juror for cause, and we do not have that question before us. The record does not disclose any basis for reversing the case on grounds that the defendant was denied an impartial jury selected at random from a fair cross section of the communi-

ty.

3. We have examined the prosecutor's remarks during closing argument in response to the remarks of defense counsel and in light of the record in the case, and we do not believe that the prosecutor's remarks, including those that the defendant "lied" and "cheated" and was a "con man," were beyond the leeway permitted counsel in characterizing and summarizing the case for the jury.

Accordingly, the judgment of conviction entered by the District Court on the jury's verdict of guilty is affirmed.

ENTERED BY ORDER OF THE COURT

S/ John A. Hehman
Clerk

APPENDIX D

ORDER DENYING PETITION TO REHEAR

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 78 - 5317

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v. ORDER

CARL E. FRIEND,
Defendant-Appellant

FILED: June 7, 1979

Before: WEICK, ENGEL and MERRITT, Circuit Judges.

The Court has considered defendant's petition to rehear the above-entitled case argued February 22, 1979, in which the order of affirmance was filed March 27, 1979.

The Court finds that there are typographical errors in the order filed March 27, 1979, in paragraph 2 on page 2. In lines 5 and 6 of paragraph 2, page 2, the word "witness" should be changed to the word "juror," and in line 8 of paragraph 2 the word "defendants' " should be changed to the words "the jurors'. "

The Court has considered defendant's argument again respecting the mistake made by the clerk of the District

Court in failing to have placed the jury card of the juror, Edna Dollar, in the jury wheel at the beginning of the jury selection process. This juror's card should have been placed in the jury wheel at the beginning of the voir dire, as defendant argues, but we cannot see how the correction of this mistake by placing the juror's name in the jury wheel during the voir dire process constitutes an error affecting the substantial rights of the parties under Rule 52, Fed. R. Crim. P. Defense counsel knew that this juror was a member of the panel from which the jury would be selected. She was apparently in the courtroom as a member of the panel, her name was on the jury panel list and the only mistake by the clerk was in failing to place the juror's card in the jury wheel at the beginning of the jury selection process rather than at a time when the selection process was coming to an end. We do not see that the placement of the juror's card in the jury wheel during the process of jury selection denied a random selection process. If the juror's card had been placed in the jury wheel from the beginning, and the juror had not yet been selected, the jury wheel would have contained the same selection material as it did after her card was placed in the jury selection wheel in order to correct the original mistake.

Accordingly, the petition to rehear is denied.

ENTERED BY ORDER OF THE COURT

S/ John A. Hehman
Clerk

APPENDIX E

ORDER STAYING MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 78-5317

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

CARL E. FRIEND,
Defendant-Appellant.

FILED: June 15, 1979

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT.

S/ John A. Hehman
Clerk

APPENDIX F

EXCERPT FROM TRIAL TRANSCRIPT PERTAINING TO JURY SELECTION PROCESS

8. Edna Dollar.

THE COURT: All right, Mrs. Dollar, your name was added to an otherwise typed list and we don't have any information about what you do.

JUROR DOLLAR: Well, of course, I'm a housewife, but my husband and I are self-employed, we are Shockley Products Distributors, which is a food supplement. In other words, direct selling.

THE COURT: Direct selling of –

JUROR DOLLAR: Home to home and parties and neighbors.

THE COURT: But tell me again what it includes, it doesn't include records?

JUROR DOLLAR: No, it is food supplements, vitamins and household cleaning aides skincare.

THE COURT: As far as what you have told me and what you have heard it wouldn't have anything to do with this case, would it?

JUROR DOLLAR: Not that I know of, there is no connection.

THE COURT: Now, you and your husband are in that together?

JUROR DOLLAR: Yes, sir.

THE COURT: Have you ever served on a jury?

JUROR DOLLAR: No, I haven't.

THE COURT: Have you been in the courtroom the entire time we have been talking about this case?

JUROR DOLLAR: Yes.

THE COURT: I think there was a time when we had to – we didn't have your card up here, but we had you, is that right?

JUROR DOLLAR: Right.

THE COURT: You have been here since I put the first juror in the box?

JUROR DOLLAR: Yes, sir.

THE COURT: Did any of the questions I asked about this case apply to you?

JUROR DOLLAR: No, with the exception that I have never met Kemmons Wilson myself personally, but my husband more or less grew up with him out near Cooper, and my son-in-law is employed at Holiday Inn up until about three years ago.

THE COURT: He is not employed there now?

JUROR DOLLAR: No.

THE COURT: What did he do?

JUROR DOLLAR: He was in marketing.

THE COURT: Well, this reference has been to Mr. Wilson as an individual, I don't know whether Holiday Inns will be involved, but they are not named. The relationship that the members of your family have with Kemmons Wilson, would that make any difference to you in this case?

JUROR DOLLAR: Not to me.

THE COURT: You don't even know the man?

JUROR DOLLAR: No, sir.

THE COURT: If he comes in as a witness will you treat his testimony like all others?

JUROR DOLLAR: Yes, sir, I would.

THE COURT: All right, may I see the lawyers up here?

(Thereupon, counsel approached the bench and the following occurred out of the hearing of the jury:)

THE COURT: I believe the defendant has used up all challenges and the government has one. Rather than submit lists I will give you an opportunity.

MR. RAINES: I have to say I feel an obligation to challenge this lady for cause if her card was not in the wheel during the entire time they were being randomly selected. I am sorry but I feel I have the obligation.

THE COURT: I have the obligation to overrule your objection.

MR. CLANCY: Could Your Honor ask one other question?

She says her son-in-law was in marketing, and part of this project was marketing with Holiday Inn.

THE COURT: All right, I overrule the objection to the card not being in here, and you will have to submit lists.

MR. RAINES: Are we excused?

THE COURT: All right, and you will have to submit a list after I ask the questions.

(Thereupon, counsel returned to the counsel table and the trial continued in the presence and hearing of the jury, as follows:)

THE COURT: All right, Mrs. Dollar, it may be that there will be some reference that this matter was to be marketed through Holiday Inns.

Does your son-in-law -- I assume he would have told you if he had anything to do with this?

JUROR DOLLAR: No, my son-in-law was in marketing for Holiday Inns in that division somewhere. I couldn't tell

you exactly. He is now with the Federal Aviation Administration and has been for the past three and a half years.

THE COURT: But this topic we have referred to about these records, your son-in-law didn't have anything to do with that?

JUROR DOLLAR: No.

THE COURT: You mean marketing, not inns?

JUROR DOLLAR: Marketing division, I guess, that's all I know.

THE COURT: All right, thank you, let's have the next lists, please.